

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JULY 19 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0148-PR
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ALEXANDER GEORGE KISS,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20023022

Honorable Virginia C. Kelly, Judge

REVIEW GRANTED; RELIEF DENIED

Alexander G. Kiss

Florence
In Propria Persona

H O W A R D, Presiding Judge.

¶1 Petitioner Alexander George Kiss pled guilty to attempted first-degree murder, aggravated assault with a deadly weapon or dangerous instrument, and sexual abuse, and the trial court sentenced him to concurrent, aggravated prison terms of ten years, fifteen years, and two years. This appears to be his fourth post-conviction proceeding filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. Kiss sought review by this court of the trial court's

denial of relief on his claim in the second proceeding that he was entitled to relief under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and we denied relief. *State v. Kiss*, No. 2 CA-CR 2005-0340-PR (memorandum decision filed May 9, 2006). In this petition for review, Kiss contends the trial court erred by summarily dismissing his notice of post-conviction relief, in which he stated he wished to raise a claim based on the Supreme Court's decision in *Cunningham v. California*, ___ U.S. ___, 127 S. Ct. 856 (2007), arguing it was a significant change in the law entitling him to relief under Rule 32.1(g).

¶2 In *Cunningham*, the Supreme Court held that California's sentencing laws, which permitted a judge rather than a jury to find facts that exposed the defendant to a sentence above the statutory maximum, were unconstitutional. ___ U.S. at ___, 127 S. Ct. at 871. The Court found California's scheme invalid for the same reasons it had found the Washington sentencing laws constitutionally infirm in *Blakely* and the Federal Sentencing Guidelines constitutionally infirm in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). Kiss attempted to file an amended petition in his third post-conviction proceeding to include the claim based on *Cunningham*, but the trial court would not permit him to do so because that proceeding had already been dismissed. Kiss filed a new notice of post-conviction relief, together with a "Memorandum in Support of Third Notice of Post-Conviction Relief/Motion for Appointment of Counsel." The state filed its "Opposition to Motion for Third Petition for Post Conviction Relief" on April 6, 2007, and on April 9, the trial court dismissed the notice.

¶3 In the notice of post-conviction relief, Kiss stated summarily that he was entitled to relief based on *Blakely* and *Cunningham*. But, in the memorandum, he asserted that *Cunningham* was a significant change in the law that rendered our supreme court's decision in *State v. Martinez*, 210 Ariz. 578, 115 P.3d 618 (2005), "wrongly decided" and entitled him to be resentenced "under the Sixth Amendment and *Blakely v. Washington*." Pointing to the substantive portions of the Supreme Court's decision in *Cunningham*, the trial court summarily dismissed the notice pursuant to Rule 32.2(b), finding Kiss had "not substantiated his claim that *Cunningham v. California* is a change in the law" under Rule 32.1(g). The trial court stated that "*Cunningham v. California* did not address Arizona's sentencing scheme or the Arizona Supreme Court's decision in . . . *Martinez*."

¶4 On review, Kiss maintains the trial court erred by summarily dismissing the notice without permitting him to file a petition for post-conviction relief in which he could assert his arguments on why *Cunningham* was a significant change in the law that entitled him to relief. We disagree. Rule 32.2(b) requires a trial court to summarily dismiss a successive notice of post-conviction relief if the defendant fails to substantiate his or her contention that the claim is not precluded either because it falls within one of the exceptions to the rule of preclusion or because the defendant has stated a valid reason for failing to timely raise the claim in a previous proceeding. Thus, it was Kiss's burden to establish *Cunningham* was applicable to his case and that applying it "would probably overturn . . . [his] . . . sentence." Ariz. R. Crim. P. 32.1(g).

¶5 The trial court was correct that Kiss did not sustain his burden. There is nothing in *Cunningham* invalidating *Martinez*. *Cunningham* did not alter the validity of this court’s May 2006 memorandum decision in which we relied, in part, on *Martinez* to conclude that Kiss was not entitled to relief under *Blakely*. Thus, Kiss’s claim cannot even arguably be characterized as a claim under Rule 32.1(g), and the trial court did not abuse its discretion when it summarily dismissed Kiss’s most recent notice of post-conviction relief. *See State v. Rosales*, 205 Ariz. 86, ¶ 1, 66 P.3d 1263, 1264 (App. 2003) (reviewing for abuse of discretion trial court’s decision to summarily dismiss notice of post-conviction relief).

¶6 We grant Kiss’s petition for review, but for the reasons stated, we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge